

ISSUE DATE: July 22, 1996

DOCKET NO. P-5110/C-94-1139

ORDER DENYING REQUEST FOR RECONSIDERATION AND CLOSING DOCKET

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Joel Jacobs  
Marshall Johnson  
Dee Knaak  
Don Storm

Chair  
Commissioner  
Commissioner  
Commissioner

In the Matter of a Complaint against Jones  
Intercable for Provision of Unauthorized  
Telephone Service

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RECONSIDERATION AND CLOSING  
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**PROCEDURAL HISTORY**

On December 9, 1994, Lakedale Telephone Company (Lakedale) filed a formal complaint against Jones Intercable, Inc. (Jones or the Company), alleging that Jones was providing telephone service in Minnesota without Commission authority. Lakedale is a local exchange company serving a number of exchanges, primarily in Wright County. Jones is a cable television operator with service franchises in several Minnesota counties, including Wright County. Jones provides private line service (also known as special access service) via five fiber optic cables to Wright-Hennepin Cooperative Electric Association (Wright-Hennepin). The private line service connects Wright-Hennepin's Maple Lake office with its Rockford office, located in the Twin Cities Metropolitan Calling Area. Before Jones began providing the private line service, a similar service was provided by Lakedale.

On April 18, 1996, Jones, now known as Cable TV Fund 14-A, d/b/a Jones Intercable, Ltd., filed an application for authority to provide non-switched telecommunications services to Wright-Hennepin. The application was assigned to Docket No. P-5110/NA-96-430 (the 96-430 Docket).

On April 24, 1996, the Commission issued its ORDER TO CEASE UNAUTHORIZED PROVISION OF TELECOMMUNICATIONS SERVICE IN MINNESOTA. In that Order the Commission found that Jones was providing Wright-Hennepin with private line/special access telephone service without the requisite Commission authority. The Commission directed Jones to cease providing telephone service until the Company obtained a certificate of authority from the Commission.

On April 25, 1996, Jones filed a request for interim operating authority, pending the Commission's consideration of the Company's petition for a certificate of authority.

On May 2, 1996, Jones filed a motion for stay of the Commission's April 24, 1996 Order until

the Commission rules on the Company's petitions for interim and permanent authority.

On May 6, 1996, Jones filed a report with the Commission, stating that it had ceased providing telephone service in Minnesota, pursuant to the Commission's Order.

On May 7, 1996, Jones filed a petition for reconsideration of the April 24, 1996 Order.

On May 9, 1996, the Department of Public Service (the Department) filed comments recommending Commission approval of Jones' request for interim authority and motion to stay. The Residential Utilities Division of the Office of the Attorney General filed similar comments on May 10, 1996.

On May 10, 1996, Lakedale filed comments in opposition to Jones' request for interim authority and motion to stay. Lakedale filed an answer to Jones' petition for reconsideration on May 20, 1996.

On July 2, 1996, the matter came before the Commission for consideration.

### **FINDINGS AND CONCLUSIONS**

Jones has three requests before the Commission in this docket: a petition for reconsideration, a motion to stay the Commission's April 24, 1996 Order, and a request for interim authority.

At the July 2, 1996 meeting in which the Commission considered the three Jones issues raised in this docket, the Commission also considered Jones' request for a certificate of authority in Docket No. P-5110/NA-96-430. The Commission approved Jones' request for authority in the 96-430 Docket; that approval is memorialized in the Commission's ORDER GRANTING REQUEST FOR CERTIFICATE OF AUTHORITY issued on this date.

Because Jones now has authority to provide private line service to Wright-Hennepin, Jones' petition for interim authority and motion to stay the Commission's Order forbidding unauthorized service are rendered moot and will not be discussed in this Order. The Commission will, however, answer Jones' petition for reconsideration. The Commission wishes to clarify that it possesses the specific authority challenged in the Jones reconsideration petition.

#### **I. THE PETITION FOR RECONSIDERATION**

Jones petitioned the Commission to vacate its April 24, 1996 Order and allow Jones to continue serving Wright-Hennepin without Commission authority. Jones stated that the April 24 Order forbidding uncertificated service exceeded Commission authority and ignored the unique factual circumstances of this case.

Jones offered three reasons that the April 24 Order should be vacated. First, Jones claimed that it is not a telephone company furnishing telephone service to the public because it offers service to only one entity, Wright-Hennepin. Jones argued that the Commission erroneously relied upon the Minnesota Supreme Court's decision in Northwestern Bell Telephone Co. v. Minnesota P.U.C., 420 N.W. 2d 646 (1988) to support the premise that the number of customers constituting the public is irrelevant. According to Jones, Northwestern Bell stands for the premise that a customer's lack of bargaining power over a utility may trigger Commission jurisdiction, regardless of the size or number of customers served. Jones argued that in the present situation the utility provider, Jones, lacks the bargaining power and the customer, Wright-Hennepin, "holds the cards"--the ownership of the poles Jones uses to string cable. Citing Minnesota Microwave, Inc. v. Public Service Commission, 190 N.W. 2d 661 (1971), Jones concluded that "...there is no basis for imposing public utility regulation here on a company that has no bargaining power over its sole customer because the 'usual monopolistic evils' are not threatened."

Jones' second reason for reconsideration was the Commission's conclusion that the franchisor/franchisee certification exception of the Commission's April 22, 1994 Order regarding Continental Telecommunications Corporation<sup>1</sup> was inapplicable to the Jones facts. Jones argued that the Minnesota Supreme Court decision relied upon in the Continental Order did not distinguish a municipal franchise from any other private use of a single customer. Jones also argued that the facts of the present case are sufficiently analogous to the franchise situation to warrant application of the Continental certification exception.

Jones advanced a third reason that the Commission should reconsider and vacate its April 24, 1996 Order. According to Jones, the Commission had failed to address the unique circumstances under which Jones provides service to Wright-Hennepin. If Jones fails to serve Wright-Hennepin, Wright-Hennepin may terminate the pole attachment arrangement under the terms of the parties' Fiber Lease Agreement. Jones stated that the Commission's decision failed to adequately address the public interest considerations of an uninterrupted continuation of cable television service.

## **II. THE LAKEDALE RESPONSE**

Lakedale stated that the Commission has the statutory authority to require Jones to obtain a certificate to provide service. Minn. Stat. § 237.16, subd. 1 provides the Commission with exclusive jurisdiction over any person furnishing local service to subscribers. Lakedale disagreed with Jones' attempts to limit the Commission's authority to regulate Jones' provision of service.

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<sup>1</sup> In the Matter of an Application by Continental Telecommunications Corporation of Minnesota for Authority to Provide Private Line and Special Access Services in Minnesota, Docket No. P-3123/NA-93-198, ORDER APPROVING PETITION WITH REQUIREMENTS AND REQUIRING FURTHER FILINGS.

Lakedale argued that the Commission cited to the Northwestern Bell decision simply to state that the number of subscribers to a service is not dispositive of the question of whether or not telephone service is offered “to the public.” Lakedale also noted that the Northwestern Bell court found that Commission jurisdiction extends to the provision of a service designed to supplement two-way communications. This would include Jones’ private line offering.

Lakedale also opposed Jones’ “special factual circumstances” argument. Although Jones claims that cable subscribers may have service interruptions under the Commission’s decision, Jones has not produced evidence of any such event.

### **III. COMMISSION DECISION**

#### **A. Jones Falls under the Requirements for Certification**

The Commission remains convinced that it has the statutory authority to require Jones to obtain a certificate of authority before providing private line service to Wright-Hennepin. Jones has offered no new argument which would persuade the Commission to reconsider or vacate its April 24 decision requiring cessation of service. Although Jones will be offering service under its new certificate of authority granted this date in the 96-430 Docket, had Jones not sought and obtained certification it would have remained precluded from offering service under the April 24 Order.

As the Commission stated in the April 24, 1996 Order, Jones’ provision of private line service clearly comes under the Commission’s regulatory jurisdiction and clearly requires Commission certification. Jones is a telephone company as defined under Minn. Stat. § 237.01, subd. 2:

[A]ny person, firm, association or any corporation, private or municipal, owning or operating any telephone line or telephone exchange for hire, wholly or partly within this state or furnishing any telephone service to the public.

Jones offers two-way communication in the form of private line service. The service is for hire because Jones receives from Wright-Hennepin both a cash payment and the benefit of the use of necessary poles. The service is offered to the public because it is offered to a third party and does not fall under any exception either through the type of customer or number of customers.

Under Minn. Stat. § 237.16, Jones must therefore obtain a certificate of authority before offering the service.

#### **B. The Facts Do Not Fall under the Certification Exceptions Offered by Jones**

The Commission is unpersuaded by Jones’ arguments against Commission authority to require certification.

## **1. The Northwestern Bell Decision**

Jones states that the Commission erroneously relied upon the Minnesota Supreme Court's Northwestern Bell decision; the Commission finds that this case supports the need for certification.

In deciding to assert its jurisdiction over the telephone services in question, the Supreme Court in Northwestern Bell noted that the term "telephone service" refers to the supplying of facilities for two-way communication. This definition applies to the private line service offered by Jones.

As noted by the Commission in its April 24, 1996 Order, the Northwestern Bell decision stands for the premise that the particular circumstances of the customer will not change the nature of the service offering. The Northwestern Bell Court contrasted the service in question (Northwestern Bell's providing directory assistance, local operator assistance and repair reporting services to local exchange companies) with the Minnesota Microwave closed circuit system which did not go to the public generally, but to certain large subscribers. The latter system was not considered telephone service to the public. Northwestern Bell argued that its service to large subscribers (local exchange companies) meant that the offerings were alike and that its service was therefore not to "the public." The Court disagreed, stating that "we cannot conclude here...that the size of the subscribers establishes the actual character of the service provided by [Northwestern Bell]." Northwestern Bell at p. 649.

The facts in the Jones case do not require an examination of the relative bargaining positions of the parties, as did the facts in the Northwestern Bell case. Jones' service is not similar to Minnesota Microwave's one-way, closed circuit system, which, in the words of the Bell Court, "simply did not look like what the legislature must have intended by the term "telephone service." Nor is the matter one of first impression, as in Bell, in which the Court was deciding for the first time if a telephone company's charges to a local exchange company, rather than directly to a customer, are under the Commission's jurisdiction. Jones is simply offering private line service, long established as local service, to a single private customer, Wright-Hennepin. Jones has offered no reasoning to support its contention that its service, offered to a single customer, is out of the Commission's jurisdictional paradigm, requiring an examination of the parties' relative bargaining positions to decide if the Commission's jurisdiction should be triggered. Jones is offering local telephone service to the public; it must obtain Commission certification in order to provide the service. The facts in the Northwestern Bell case cannot be read to undermine the Commission's usual authority to require certification.

## **2. The Commission's Continental Telecommunications Decision**

Jones states that the Commission's interpretation of the franchise exception to the certification requirement misreads the Minnesota Supreme Court decision, City of St. Paul v. Tri-State Telephone and Telegraph Company, 193 Minn. 484, 258 N.W. 822 (1935) upon which the Continental decision is based. According to Jones, the Tri-State decision placed the service (the telephone company's provision of wires, poles and conductor's for the City's own police and fire alarm system) outside of Commission jurisdiction because the service was reserved for

the private use of a single customer, as distinguished from the public at large.

The Commission notes first that the Continental decision was the product of a unique set of circumstances, in which a cable TV provider was required as part of its City cable TV franchise to offer telephone service to the City. At the time of the Commission's Continental decision, the cable TV provider was ceasing all operations in the City; its operations were being superseded by a telecommunications provider. The Commission granted the cable provider an exemption from certification in retrospect. As the Commission noted in the Continental Order, "the classification of [the cable provider's] service remains relevant only in the context of a possible refund for service provided prior to certification." Order at p. 3. Continental, then, is based on very narrow factual grounds, time-specific, and of limited usefulness in determining the need for certified authority to provide telephone service.

Even if the Commission considers Jones' reference to the Continental Order, the Commission does not find that either the Commission's Continental Order or the Tri-State Court decision mentioned in it was based upon a finding that the telephone service was provided to a single customer. The Commission finds that its April 24, 1996 decision refusing to allow Jones an exception to the certification requirement was consistent with both the Continental decision granting a narrow exception for a company providing service to the City under a cable TV franchise arrangement and the Tri-State Supreme Court decision mentioned in the Continental Order.

Jones cannot cite to any provision of either Tri-State or Continental to support its premise that service to any single entity takes the provider out of the Commission's jurisdiction. Jones was offering public service to a third party without any exception to the certification requirement; the Commission has the clear authority to require certification.

### **3. Special Facts of the Jones/Wright-Hennepin Fiber Lease Agreement**

Jones states that the Commission failed in its April 24, 1996 Order to address its unique fiber lease arrangement with Wright-Hennepin and the related public interest implications of an uninterrupted continuation of cable television service.

Because the Commission has on this date granted Jones a certificate of authority to provide service to Wright-Hennepin in Docket No. P-5110/NA-96-430, the Commission finds that it need not reach this argument.

### **ORDER**

1. The Commission denies Jones' petition for reconsideration
2. Docket No. 5110/C-94-1139 is closed.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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